In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1462

SAM ALTA DRYDEN AND RAY BUEIEW HUTCHESON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-7) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1970. The petition for a writ of certiorari was filed on April 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory requirements of registration and bonding of liquor violate the privilege against self-incrimination.

2. Whether petitioner Hutcheson and defense counsel were improperly prevented by federal agents from speaking to a government witness.

3. Whether prior convictions for similar offenses could be considered on the issue of intent and guilty knowledge of petitioners, as well as for impeachment purposes.

4. Whether the evidence sustained a finding of a single conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Alabama, petitioners were convicted of conspiracy to violate the statutes relating to the manufacturing of distilled liquor. Petitioner Dryden was sentenced to imprisonment for five years, petitioner Hutcheson to four years. The court of appeals affirmed.

Robert Herrin, who resided in Hattiesburg, Mississippi, testified at trial that sometime in 1967 he was approached by one Godwin who expressed an interest in locating a source for purchasing non-tax-paid whiskey in Mississippi and setting up a distillery. After Herrin agreed to help, Godwin introduced Herrin to petitioner Hutcheson. The three men discussed proposed sites for the illegal distillery and division of the profits (Tr. 108; 110-111). When a location for the

still was found, Herrin telephoned petitioner Hutcheson who agreed to provide $1,000 to set up the still (Tr. 112-113). Subsequently, Herrin discussed details of the distillery operation with Godwin and petitioner Dryden (Tr. 116-117). Herrin received a further payment of $3,000 from Dryden and Hutcheson (Tr. 119). In the spring of 1967 Herrin, in the presence of Dryden, made arrangements with one Joe Adams for Dryden to use Herrin's truck to pick up the whiskey. Adams was later paid $1,550 by Herrin, who had received the money from petitioner Hutcheson (Tr. 124).[1]

Joe Adams testified that he had been hired by petitioner Dryden and Godwin to transport illegal whiskey throughout Mississippi and Alabama. He estimated that he had transported between 42 and 48 thousand gallons of illegal whiskey (Tr. 323). At the request of petitioner Hutcheson, Adams turned over records of the business so that Hutcheson could estimate his share of the profits which he claimed not to have been receiving (Tr. 303).

Wade Farris testified that he also helped transport whiskey (Tr. 411-418).[2] On one occasion, he found a location for a still in Georgia which petitioner Dry-

---

[1] Herrin was arrested for bribing a law enforcement officer to refrain from reporting the still (Tr. 128). He was later contacted by petitioner Hutcheson, who asked him if he wanted to work in the illegal whiskey business in Alabama. After declining, Herrin continued working for both petitioners in Mississippi (Tr. 134-135).

[2] Farris informed the Alcohol and Tobacco Tax Unit when first contacted by Godwin and reported his activities to federal agents thereafter (Tr. 409-411, 414-417).

den went to inspect (Tr. 414-417). On several occasions Farris accompanied Godwin to Hutcheson's store before picking up the whiskey at a place not far from the store (Tr. 419). One time Hutcheson directed Farris to wait at a designated place for a couple in a pickup truck who would show Farris where some illegal whiskey was hidden (Tr. 420-421).[3]

ARGUMENT

1. Relying on *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, *Haynes* v. *United States*, 390 U.S. 85, *United States* v. *Leary*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, petitioners contend that their Fifth Amendment privilege against self-incrimination provides a defense to charges of violating the federal statutes requiring the registration and bonding of distilleries (26 U.S.C. 5171 *et seq.*). Such an argument has, however, been uniformly rejected by all the courts that have considered it, and review of this issue has consistently been declined by this Court. *E.g.*, *United States* v. *Fricano*, 416 F. 2d 434 (C.A. 2); *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *Wilson* v. *United States*, 409 F. 2d 604 (C.A. 5), certiorari denied, 395 U.S. 923.

There are significant distinctions between the liquor laws and the tax schemes involved in the cases relied upon by petitioners. Those cases dealt with statutes specifically directed toward a select group involved in

[3] Evidence of calls from and to various individuals involved in the illegal whiskey operation were traced to both petitioners (Tr. 190-201; 205-219; 454-497).

BLEED THROUGH POOR COPY

activities inherently suspect as criminal, and required individuals subject to the terms of those statutes to incriminate themselves in the course of compliance. Individuals involved in the liquor industry cannot be termed a "highly selective group inherently suspect of criminal activities," but rather are individuals whose activities appropriately give rise to an "essentially non-criminal and regulatory area of inquiry." See, *e.g.*, *Haynes* v. *United States*, *supra*, 390 U.S. at 98-99; see also *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70. The laws relating to distilled spirits have never been regarded as a disguise for obtaining incriminating disclosures. See *United States* v. *Ulrici*, 111 U.S. 38. The information required to be divulged by a distillery operator is limited to the collection of data necessary for efficient administration of a major revenue-gathering program. Unlike the situation in the gambling and firearms tax areas, registrants who comply with the liquor tax requirements have no substantial basis for fearing that their disclosures will confront them with "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination" (*Marchetti* v. *United States*, *supra*, 390 U.S. at 53).

2. At trial defense counsel moved to suppress the in-court testimony of Robert Herrin on the ground that counsel had been unlawfully prevented by federal agents from interviewing Herrin. Herrin testified that he was called by Hutcheson and asked to sign an affidavit stating that he knew neither Dryden nor Hutcheson (Tr. 88). At first Herrin indicated a willingness to sign this affidavit. He later sought advice from Agent Petre (Tr. 88-89), who told him

he would be committing perjury by signing the affidavit. Contrary to petitioners' claim, Petre did not tell Herrin not to speak to petitioners or defense counsel (Tr. 88-90). Herrin also testified that Agent Berry, whom he also consulted, neither advised nor prevented him from speaking to petitioner or defense counsel (Tr. 90). Herrin had requested Agent Berry to meet Hutcheson and defense counsel when they came to see him, stating, "I just didn't want to come in contact with Mr. Ray (Hutcheson) personally" (Tr. 97).

Thus, this testimony clearly shows that Herrin had not been influenced by federal agents or prevented by them from being interviewed by defense counsel. Rather, his decision not to speak with counsel was of his own making, as the court of appeals pointed out (Pet. App. 6), and "Herrin clearly had a right to refuse to be interviewed" (*ibid.*). Accordingly, the trial court correctly denied the motion to suppress Herrin's testimony.

3. After Hutcheson denied any knowledge or involvement in this illegal whiskey operation, claiming that he had innocently done favors for his acquaintances (Tr. 674), evidence was admitted showing that Hutcheson had four prior convictions involving similar recent offenses with the same associates, Dryden and Godwin (Tr. 678-679; 681-685). The trial court instructed the jury that this evidence could be used "for whatever value [it] may be on the question of intent and guilty knowledge" (Tr. 686-687).[4]

---

[4] More fully, the court charged the jury: "You jurors may consider this testimony concerning this witness's previous con-

Petitioner argues that the testimony in question should have been allowed only for impeachment purposes. This contention is, however, without merit. Evidence of prior, similar crimes has always been regarded as admissible on the issue of intent. It is particularly pertinent in this case, because both Hutcheson and Dryden denied that they were in any way involved in this illegal whiskey operation (see Tr. 674). See, *e.g.*, *United States* v. *Klein*, 340 F. 2d 547, 549 (C.A. 2), certiorari denied, 382 U.S. 850; *Matthews* v. *United States*, 407 F. 2d 1371, 1381 (C.A. 5); *United States* v. *Thune*, 411 F. 2d 620 (C.A. 5); *United States* v. *Restrepo*, 417 F. 2d 927 (C.A. 5).

4. Finally, petitioner Hutcheson argues that the evidence justified the finding of two conspiracies, not one as charged. He further asserts that at most he was involved only in the separate conspiracy in Mississippi over which the Middle District Court of Alabama would have no jurisdiction. However, the evidence clearly demonstrates a unitary conspiracy financed by petitioners and covering three States. The single goal of this conspiracy was to sell illegal whiskey and concomitant with that purpose efforts were made to establish stills in several States. See *Blumenthal* v. *United States*, 332 U.S. 539. Each member of this illegal undertaking played an integral part in the scheme in furtherance of their common

---

victions, if you find them to be of a similar nature and within a reasonable time, on the question of the witness's credibility; you may also consider them for whatever value they may be on the question of intent and guilty knowledge * * *" (Tr. 686-687).

goal. Even if Hutcheson and some of the others did not actively participate in the entire operation it does not excuse them from the conspiracy, since the transactions involving others were intertwined with their own complicity in the overall scheme. See *United States* v. *Dardi*, 330 F. 2d 316, 329 (C.A. 2), certiorari denied, 379 U.S. 845, 869. See *Berger* v. *United States*, 295 U.S. 78; *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959. Moreover, contrary to petitioner Hutcheson's contention, evidence was admitted at trial linking him to the illegal operation in Alabama, including testimony that Hutcheson asked Herrin to work for him in Alabama in the illegal whiskey business; that Hutcheson asked Adams for the records of the sales of the illegal liquor which included Alabama, in order to determine his profits; and that Hutcheson, while in Alabama, told Farris how to locate the hiding place of some illegal whiskey.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
COLLEEN KOLLAR,
Attorneys.

MAY 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 384923 708